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IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN DIFFENDAL,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition For Writ Of Certiorari
To The Maryland Court Of Special Appeals

PETITION FOR WRIT OF CERTIORARI

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November 28, 2006

QUESTION PRESENTED

Whether, in light of *Samson v. California*, 126 S. Ct. 2193 (2006), an evidentiary hearing was required to determine that, under a "totality of the circumstances" analysis of reasonableness, the Fourth Amendment was not violated by the Maryland DNA collection statute, MD. CODE ANN., PUB. SAFETY, §§ 2-501 *et seq.* (2003), which requires the warrantless seizure of convictees' DNA without any showing of probable cause or even mere suspicion of further criminal conduct?

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IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN DIFFENDAL,

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v.

STATE OF MARYLAND,

Respondent.

On Petition For Writ Of Certiorari
To The Maryland Court Of Special Appeals

PETITION FOR WRIT OF CERTIORARI

Steven Diffendal petitions the Court to issue a writ of certiorari to the Maryland Court of Special Appeals to review the judgment which that court entered against him in its case *Steven Diffendal v. State of Maryland*, No. 218 (Sept. Term 2004).

JURISDICTIONAL STATEMENT

The Maryland Court of Special Appeals entered its judgment in its case *Steven Diffendal v. State of Maryland*, No. 218 (Sept. Term 2004) on March 28, 2006. Diffendal timely sought discretionary review from the highest state appellate court, the Maryland Court of Appeals, and on August 30, 2006, that court denied Diffendal's petition for writ of certiorari after judgment.

The opinion of the Maryland Court of Special Appeals is unpublished and has been reproduced in the appendix to this petition at A. 2

The present petition was filed with this Court on November 28, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a state statute, MD. CODE ANN., PUB. SAFETY, §§ 2-501 *et seq.* (2006) (the "Maryland DNA collection statute"), under the Fourth Amendment of the United States Constitution. The pertinent statutory and constitutional provisions are reproduced in the appendix to this petition at A. 4 and A. 5.

STATEMENT OF THE CASE

1. *The Nature of the Case.* In a 39-count indictment, the State of Maryland charged petitioner Steven Diffendal with first degree rape and related charges arising out of a home invasion that occurred on November 25, 2000, in Baltimore County, Maryland. Diffendal was identified as a suspect only after a DNA profile that had been developed from evidence collected at the crime scene was "matched" with his DNA profile contained in the Maryland state DNA database. The database was created pursuant to the Maryland DNA collection statute to investigate past or future crimes. The statute mandates the seizure of DNA from a legislatively defined class of persons who have been convicted of a qualifying offense without any requirement for a warrant or indicia of individualized suspicion. Diffendal's qualifying conviction was a 1992 robbery.

The Maryland DNA collection statute was originally enacted by the General Assembly in 1994 to create a statewide DNA database collection system and repository for access by law enforcement agencies investigating past and future crimes. Act of 1995, Maryland Code Ann., Art. 88B, § 12A (1995). The statute mandates the seizure of DNA samples from any person convicted of a qualifying crime without any showing of (i) an individualized suspicion that the person has or will commit another offense; or (ii) a need that a sample be taken to aid in the investigation of a particular crime. MD. CODE ANN., PUB. SAFETY, § 2-504 (2006) (A. 4). A DNA profile is developed from the sample, digitized, and entered into a database that is accessible by any law enforcement related entity that participates in "CODIS," the federally sponsored network that links state and local databases into a national DNA database. DNA profiles developed from evidence collected at a crime scene are searched against the reference DNA profiles maintained in the database. A comparison that results in a "match" is statutorily deemed to be probable cause for the issuance of a search warrant to obtain an additional DNA sample from the subject. *Id.* § 2-510.

As originally enacted, the statute limited qualifying crimes of violence to convictions for child abuse that involved sexual abuse, rape in any degree, or a sexual offense in the first, second, or third degree. Act of 1995, Maryland Code Ann., Art. 88B, § 12A(a)(8)(i)(ii)(iii). Effective October 1, 1999, the offenses of murder, robbery or robbery with a deadly weapon, first degree assault, or attempts to commit these offenses were added to the category of qualifying offenses. Act of 1999, Maryland Code, Ann., Art. 88B, § 12A(a)(8)(iv)-(vii)(1999). Effective October 1, 2002, the list of qualifying offenses was expanded to include a conviction for any felony and certain misdemeanor burglary charges. Maryland Code, Ann., Public Safety Art., § 2-504(2) (including as qualifying offenses convictions for such charges as willfully filing false income tax

returns; injuring a racehorse; election offenses, *etc.*). Every state, the District of Columbia, and the federal government, have enacted DNA collection statutes that mandate the seizure of DNA without any individualized suspicion of criminal wrongdoing from different classes of individuals including non-citizen detainees, certain arrestees, and all persons convicted of felonies and certain misdemeanants.

2. *Proceedings Below.* In the trial court, Diffendal moved to suppress his DNA profile that had been seized pursuant to the Maryland DNA statute on the grounds that the warrantless seizure unsupported by any showing of individualized suspicion violated his rights under the Fourth Amendment. On February 24, 2004, the trial court heard and denied Diffendal's motion to suppress, specifically ruling as follows:

> And the Fourth Amendment, as everybody has stated, the language is the right of the people be secure in their person, house, and effects against unreasonable searches and seizures. It is not against all searches and seizures. Here, balancing the purpose of the statute against the minimal invasional nature of the withdraw of the blood and the fact that the blood is being withdrawn from an inmate who has less rights than an average free citizen, balancing that against the legitimate governmental interest, I find that the search in this case to be reasonable.

Maryland v. Diffendal, Circuit Court for Baltimore County, Case No. 03CR0743 (Feb. 24, 2004) (A. 1). To preserve the issue for appellate review, the parties proceeded to trial on the first count of the indictment on an agreed statement of facts, subject to a sentencing cap of 40 years. Diffendal was convicted and sentenced

to 40 years in the Maryland Department of Correctional Services, and the State *nolle prossed* the remaining counts of the indictment.

In an unreported decision, Maryland's intermediate appellate court affirmed the judgment entered by the trial court. (A. 2). Diffendal petitioned the Maryland Court of Appeals to review the lower court's decision. That petition was denied by an Order dated August 30, 2006. (A. 3).

REASON WHY REVIEW SHOULD BE GRANTED

The Case Presents An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court. The stakes in this case go far beyond the privacy rights of convicted criminals who are presently subject to the requirements of Maryland's DNA collection statute; rather, the privacy rights of ***all*** persons who may some day be swept within the ever increasing DNA dragnet are profoundly implicated. DNA is not simply an improved fingerprinting technique; unlike the ridges and whorls of a fingerprint, DNA carries within it information that can provide the state with insights into the most intimate workings of the human body. There are already those who claim that science will someday soon decode DNA's genetic markers for substance abuse, sexual preference, criminal tendencies, and other personality traits. Nita Farahany & William Bernet, *Behavioural Genetics In Criminal Cases: Past, Present And Future*, 2 Genomics, Society & Policy 72 (2006). The dangers of DNA profiling are profound, and it is for exactly that reason that individuals subject to the Maryland DNA collection statute should receive their full measure of Fourth Amendment protection.

The Maryland DNA collection statute ignores the fundamental tenet of "individualized suspicion" imbedded in the Fourth Amendment, a precept that defines the relationship between the state and its citizens, and replaces it with a free-

floating balancing test without any limiting principle. That is profoundly troubling, given the tremendous amount of information contained in an individual's DNA and the state's voracious appetite for increasingly sweeping greater classes of persons within its DNA dragnet. The constitutionality of the Maryland statute was narrowly upheld in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), and it is thus apparent that the ability of DNA to forge links between evidence seized from a crime scene and the hard facts of criminal cases have conspired to make bad law for all Marylanders concerned about their DNA privacy under the Fourth Amendment.

Petitioner recognizes, of course, that like the Maryland Court of Appeals in *Raines*, every federal circuit considering DNA collection statutes has upheld the statutes as constitutional under the Fourth Amendment. *See e.g., Nicholas v. Goord*, 430 F.3d 652, 671 (2d Cir. 2005); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005); *United States v. Kincade*, 379 F.3d 813, 830-32 (9th Cir. 2004) (en banc); *Green v. Berge*, 354 F.3d 675, 677-79 (7th Cir. 2004); *Groceman v. U.S. Dep't of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Jones v. Murray*, 962 F.2d 302, 306-08 (4th Cir. 1992). The majority of the circuits analyzed the reasonableness of the seizure of DNA under the Fourth Amendment by balancing the nature of the intrusion against the promotion of a legitimate governmental interest. Until last term, the use of such a free-floating balancing without the requirement of any showing of individualized criminal wrongdoing to justify a warrantless seizure for general law enforcement purposes was unprecedented outside of DNA database litigation in lower courts, but it appears to have been endorsed in a different factual context by this Court in *Samson v. California*, 126 S. Ct. 2193 (2006). A majority of the Court in *Sampson* concluded that, under a "totality of the circumstances"

analysis of reasonableness, the Fourth Amendment was not violated by a statute that authorized police officers to conduct suspicionless searches of parolees. Given that outcome, petitioner emphatically asserts that the broader rationale for the resolution in *Samson* strongly militates toward granting the request for certiorari here.

To appreciate why that is so, it is essential to focus on the larger import of the *Samson* decision, a broader significance that was eloquently explained in Justice Steven's dissenting opinion (joined by Justices Souter and Breyer). Beginning from the premise that "[t]he suspicionless search is the very evil the Fourth Amendment was intended to stamp out," *id.* at 2203, Justice Stevens contended that "our Fourth Amendment jurisprudence does not permit the conclusion ... that a search supported by neither individualized suspicion nor, 'special needs' is nonetheless 'reasonable,'" *id.*, and exactly because in *Samson* "the Court for the first time upholds an entirely suspicionless search unsupported by any special need," *id.* at 2204, Justice Stevens concluded that "[w]hat the Court sanctions today is an unprecedented curtailment of liberty." *Id.*, at 2202.

Petitioner submits that such substantial intrusions on Fourth Amendment freedoms should not be approved by courts – not, at least, on the basis of inherently vague and imprecise "totality of the circumstances" balancing tests that are, to a significant extent in specific cases, based upon particularized ***factual*** assumptions – without the benefit of adequate evidentiary records sufficient to fully inform such consequential judicial decision-making. Where the importance of the liberty interest at stake is as high as it is here, courts should not engage in constitutional interest-balancing based merely on theoretical assumptions or preconceived notions; instead, competing interests of constitutional importance should be assessed, weighed, and balanced ***only*** on the basis of a fully-developed evidentiary record. *See California Bankers Ass'n v. Shultz*, 416

U.S. 21, 56 (1974) ("concrete" factual record necessary for constitutional interest-balancing); *see generally*, *Dean v. District of Columbia*, 653 A.2d 307, 322-330 (D.C. 1995) (opinion of Ferren, J.) (discussing importance of judicial fact-finding processes when delineating the scope of constitutional rights). That is particularly so in the context of the case at bar – and all other "cold hit cases" – where the preconceived notion of infallible DNA match evidence is at odds with an ongoing dispute among statisticians and forensic scientists about the reliability of DNA profile matches resulting from database searches that could and should be further developed in an evidentiary hearing on remand to the trial court. Only then can the "reasonableness" of a statutory scheme that mandates the seizure and databanking of DNA be properly assessed under the Fourth Amendment.

The focus of the controversy over the reliability of a "match" (defined as accurately identifying the source of a forensic DNA sample) resulting from a systematic search of a large DNA database concerns (i) "ascertainment bias"[1] and (ii) the similarity

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[1] This phenomenon actually has a nonscientific name, *viz.*, the **birthday paradox**. Anyone can experience it -- the next time one is at a gathering of 20 or 30 people, ask everyone for their birth date. It is likely that two people in the group will have the same birthday. This always surprises people because people are used to comparing their particular birthdays with others. For example, if one meets someone randomly and asks him what his birthday is, the chance of the two persons having the same birthday is only 1/365 (0.27%). In other words, the probability of any two individuals having the same birthday is extremely low. Even if one asks 20 people, the probability is still low -- less than 5%. Thus, it is very rare to meet anyone with the same birthday. But when there are 20 people in a room, what changes is the fact that each of the 20 people is now asking each of the other 19 people about their birthdays. Each individual person only has a small (less than 5%) chance of success, but each person is trying it 19 times, which increases the probability of finding a match dramatically.

of DNA profiles between related persons. As to the implications of "ascertainment bias," one scientist explains:

> [T]he more extensive was your search, the less impressed I am. The reason is that among many comparisons, it is unsurprising that one of them will, "by chance," display results that, on their own, might be regarded as significant. In this setting, the effect of the search is to weaken evidential strength. This phenomenon is widely understood by scientists. Indeed, conveying the idea to the general public is often regarded as a major challenge in advancing the public understanding of science.

David J. Balding, *Errors and Misunderstandings in the Second NRC Report*, 37 Jurimetrics J. 469, 471 (1997). Similarly, the National Research Council of the National Academy of Sciences ("NRC"), which is charged with the duty to report on scientific advances to the government, has detailed the ascertainment bias in cold hit cases caused by systematic searches of a DNA database in two reports. The first NRC report acknowledged the need to differentiate between confirmation and cold hit cases as follows: "The distinction between finding a match between an evidence sample and a suspect sample and finding a match between an evidence sample and one of many entries in a DNA profile database is important. The chance of finding a match in the second case is considerably higher."[2] National Research

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[2] A clear example of the significance of ascertainment bias is illustrated by an ongoing controversy involving a study conducted of all matches at 9 or more of the 13 locations recorded in the Arizona CODIS database. The Arizona study showed that 144 pairs of profiles (288 people) out of the 65,493 profiles in the database (.4% of the total) matched each other at 9 or more loci. Two people in the Arizona

Council, *DNA Technology in Forensic Science* 124 (1992) ("NRC I"). The second report explained that "[a] special circumstance arises when the suspect is identified not by an eyewitness or by circumstantial evidence but rather through a large DNA database. If the only reason that the person becomes a suspect is that his DNA profile turned up in a database, the calculations must be modified." National Research Counsel, *The Evaluation of Forensic DNA Evidence* 32 (1996) ("NRC II"). The DNA Advisory Board, which was led by the FBI, likewise agreed that "cold hit" cases (*e.g.*, cases where the suspect is identified through a database search), are qualitatively different than "confirmation" cases (*e.g.*, cases where a suspect is initially developed through means other than a DNA database search) and, because "the probability of identifying a DNA profile by chance increases with the size of the database[,] this chance event must be taken into account when evaluating value of the matching profile found by a database search." DNA Advisory Board, *Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated from Pertinent Population Database(s)*, 2 Forensic Sci. Communications 1, 5 (July 2000). A remand is necessary,

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CODIS database even matched at 24 of the 26 numbers. The significance of these coincidental matches is, of course, best understood by considering the random match probability calculated for the 9 loci profile that initially triggered an analysis of the entire database when a match was found: **1 in 754,100,000** Caucasians. Despite the purported rarity of that profile, a "match" existed in the Arizona database between a Caucasian and African American male. Troyer, Gilboy, and Koeneman, *A Nine STR Locus Match Between Two Apparently Unrelated Individuals Using AmpF/STR Profiler Plus and COfiler* (Arizona DPS Crime Laboratory). The FBI and other states (including Maryland) staunchly refuse to allow defendants access to their databases to determine the extent of coincidental matching.

therefore, to expand the factual record on the question of the reliability of DNA profile matches resulting from database searches, and to explicate the unresolved dispute among statisticians just described.

Second, in the context of a systematic search of a large DNA database, the heritability of DNA and resulting similarity of DNA profiles between relatives undermines the significance of a match between a forensic DNA profile and a DNA profile contained in a database. Because DNA profiles are inherited in a strictly Mendelian fashion (individuals receive half of their genetic markers from each of their parents and siblings are expected, on average, to inherit the same genetic marker at a particular locus half of the time), close relatives are more likely to have the same genetic markers than two randomly chosen, unrelated individuals. *See generally*, Paoletti, Doom, Raymer, and Krane, *Assessing the Implications for Close Relatives in the Event of Similar but Nonmatching DNA Profiles*, 46 Jurimetrics 161 (Winter 2006). In fact, serious proposals have been advanced to reduce the stringency of DNA database searches for matches (*e.g.*, search for 6 or more loci matches instead of 13), to enable law enforcement to find criminals through the DNA of their relatives contained in a DNA database. F.R. Bieber, C.H. Brenner, D. Lazer, *Finding Criminals Through DNA of Their Relatives*, Science, vol. 312 (June 2, 2006). Similarly, prosecutors who recognize this limitation of DNA database searches will likely have to consider whether a close relative of an individual in a DNA database left their DNA on an evidence sample rather than the individual in the database himself. Of course, there is ***no*** corresponding need to consider that a close relative of an individual in a fingerprint database has left their fingerprint on an evidence sample rather than the individual himself. [3] Thus, the similarity of DNA profiles between relatives

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[3] This is, of course, because fingerprints, in contrast, are much less heritable. The epidermal ridges on our fingers are all formed late in

undermines the significance of a match from a database search and *amplifies* the greater intrusiveness associated with DNA databases. A remand is, therefore, also necessary to develop the factual record on the effect of this phenomenon on the accuracy of DNA database searches and the greater intrusiveness of low-stringency searches or familial searching. At least for "cold hit" cases, involving blind database searches, DNA identification may not be as well-nigh infallible as television police dramas and popular mythology claim, and petitioner merely seeks a fair opportunity to show as much.

CONCLUSION

In sum, if – as *Samson v. California* seems to imply – the constitutionality of statutes such as Maryland's DNA collection statute can properly be determined under a free-floating "totality of the circumstances" balancing test, it is imperative that judges who must strike those delicate and difficult balances be provided with complete and accurate factual predicates for their decisions. All that is sought by the instant certiorari petition is a chance to persuade this Court, on the basis of more expansive briefing and oral argument, that this case is an appropriate vehicle for development of the evidentiary record that is necessary for an informed assessment of the Fourth Amendment reasonableness of the Maryland statute.

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our embryonic development when sacs of fluid covering our digits collapse just before birth. The way in which those fluid sacs collapse and the ridges they leave us with the rest of our lives depends largely on what, when and where we bump into things as embryos. As a result, even twins that have the same genetic make-up can still be routinely distinguished by their fingerprints. *See generally* William J. Babler, *Embryologic Development of Epidermal Ridges and Their Configurations,* Birth Defects: Original Article Series 27(2): 95-112 (1991).

In the public interest, the petition for issuance of a writ of certiorari should, therefore, be granted.

Respectfully Submitted,

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***Maryland v. Diffendal*, Circuit Court for Baltimore County, Case No. 03CR0743 (Feb. 24, 2004)**

THE COURT: This is a very difficult issue for me. I have great reverence for the Fourth Amendment. I have done extensive reading about it. I know the purpose under which it was enacted and how strongly out founding fathers thought about the necessity of this amendment to the Constitution. I also will state that, quite frankly, I have disagreed with some of the decisions that the Supreme Court has entertained and decided starting in the 1980's, but I have to follow the reasoning of the supreme Court in making this decision and not sit here like James Madison who is whispering in my ear as to what my intuitive thoughts about the Fourth Amendment are.

There is a trend of cases that have now come down which look at the reasoning of these cases that has signaled a clear retreat from the exclusionary rule. I think that if this issue were before the Court in the 1960's, the suppression would probably have been granted. We have a whole line of cases now commenting on the purpose of the exclusionary rule. First of all, the purpose of the exclusionary rule, according to recent Supreme Court decision, is to deter and sanction police misconduct. If I suppress this evidence, the only person I am deterring is a nurse or medical technician who is doing their job of taking blood under what they certainly believe to be the color of a lawful statute. So, I am not deterring any police conduct whatsoever. And the Fourth Amendment, as everybody has stated, the language is the right of the people be secure in their person, house, and effects against unreasonable searches and seizures. It is not against all searches and seizures. Here, balancing the purpose of the statute against the minimal invasional nature of the withdraw of the blood and the fact that the blood is being withdrawn from an inmate who has less rights than an average free citizen, balancing that against the legitimate governmental interest, I find that the search in this case to be reasonable.

Diffendal v. Maryland, No. 218 (Sept. Term 2004)
(Md.Ct.Spec.App. March 28, 2006)
(unpublished opinion)

We are asked here to revisit the Court of Appeals's decision in *State v. Raines*, 383 Md. 1 (2004), involving the constitutionality of the Maryland DNA collection statute. *See* Md. Code (2003), § 2-501 of the Public Safety Article ("P.S.") (hereinafter, "the Act"). Pursuant to the Act, DNA was seized from Steven Diffendal, appellant, while he was incarcerated for an offense that preceded the one that is involved here. That information implicated him in the case *sub judice*, which concerns events that occurred on November 25, 2000.

Appellant was charged in March of 2003,[1] with rape, numerous sexual offenses, armed robbery, burglary, handgun offenses, assault, and false imprisonment arising out of a home invasion in Baltimore County on November 25, 2000. Appellant was identified as a suspect after evidence obtained at the crime scene was found to correspond to his DNA profile, which was contained in a DNA database.

Appellant moved to suppress the evidence of his DNA profile. At the motion hearing on February 24, 2004, the Circuit Court for Baltimore County orally denied appellant's motion. The same day appellant entered a plea of not guilty and proceeded on an agreed statement of facts as to the charge of first degree rape. The court sentenced appellant to a term of forty years' imprisonment, pursuant to an agreed-upon cap of forty years. This appeal followed.

Appellant presents two issues, which we quote:

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[1] We do not know the reason for the delay between the date of the offenses and the filing of charges.

1. Whether, in light of an intervening appellate decision articulating factors that are determinative of the "reasonableness" of a seizure of DNA, remand of this matter should be ordered for further development of the factual record on the fully preserved suppression issue, *to wit*, that the warrantless seizure – without any individualized evidence of criminal wrongdoing – of appellant's DNA was not reasonable under the Fourth Amendment [.]

2. Whether the [sic] *State v. Raines*, 383 Md. 1 (2004), wrongly decided that the Maryland DNA collection statute comports with the Fourth Amendment [.]

For the reasons discussed below, we shall affirm.

FACTUAL SUMMARY[2]

A. Statement of Facts at Trial

Late on the evening of November 25, 2000, two men forcibly entered the residence of April Goralski and her fiancé, Gary Parr.[3] Although Ms. Goralski and Mr. Parr were not home at that time, their acquaintance, Joseph Hevesy, was present. At the time of the intrusion, appellant was disguised in a "Scream" mask, wore latex gloves, and was armed with a nine millimeter handgun. The other intruder had a sawed-off shotgun, which had a hole in its stock. Upon entering the home, the intruders forced Mr. Hevesy to the basement, tied him up, ordered him to disrobe, and demanded money. The intruders then ransacked the home.

Between 2:00 a.m. and 2:30 a.m., Ms. Goralski and Mr. Parr returned home. The assailants confronted them and demanded money from Mr. Parr, claiming Mr. Parr's brother had

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[2] Our gruesome factual summary derives primarily from the stipulated facts presented at trial.

[3] Ms. Goralski and Mr. Parr were married about a year after the incident.

stolen the money from them. After Parr denied that he had the money, appellant forced Mr. Parr and Ms. Goralski into the basement, where Mr. Hevesy lay naked and bound. Like Mr. Hevesy, Mr. Parr and Ms. Goralski were forced to disrobe and were then bound at their hands and feet. The assailants continued to demand money.

Over the course of the evening, the intruders subjected Mr. Parr, Ms. Goralski, and Mr. Hevesy to a variety of physical and sexual attacks. Mr. Parr was struck in the face and sodomized by an unknown object. Ms. Goralski and Mr. Hevesy were forced to perform oral sex on each other, in front of Mr. Parr. Later in the evening, appellant took Ms. Goralski to a second floor bathroom, where she was forced to perform fellatio on him. Appellant then forced Ms. Goralski to engage in intercourse, while he used a latex glove as a condom. According to the victim, appellant withdrew before ejaculating and then masturbated into the latex glove. Ms. Goralski was returned to the basement, where she was again bound.

While in the basement, Mr. Parr informed appellant that he would obtain the money that the assailants demanded. After arrangements were made for Mr. Parr's mother to make the drop-off at a Baltimore County hotel, Mr. Parr, Ms. Goralski, and Mr. Hevesy were put in the furnace room. Ultimately, the three managed to escape and immediately contacted Parr's mother, advising her not to deliver the money; it came from a drug heist committed in Pennsylvania by Parr's brother, who had bragged about it while in jail. After a brief delay, the police were also contacted.[4]

Using an ultraviolet light, the police found bodily fluids

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[4] Apparently, there was some concern that Parr's brother might get in trouble. In addition, Hevesy had recently escaped from the Baltimore County Work Release Center.

in the bathroom. They seized a bathroom rug on which Ms. Goralski had been raped, and used it to develop a DNA profile. Parr also gave the police part of a latex glove found in the basement. The DNA profile was submitted to the federal database ("CODIS"),[5] which matched appellant's known DNA. Appellant's DNA sample was in the database because of his 1992 conviction and imprisonment for robbery; his DNA had been seized pursuant to the Act.

On the basis of the DNA match, a search warrant was issued to obtain a new DNA sample from appellant. In the statement of facts, the prosecutor said: "As a result of the two profiles, the one of the semen on the blue rug and the known sample of the [appellant's] blood, the profiles were found to match at all fourteen points of identification and ... the likelihood of having that match occur was 4.1 gragillion (phonetic)." In addition, the prosecutor advised that the tip of the latex glove was analyzed, and it was found to contain several sources of DNA. The primary source was Goralski, with three secondary sources ultimately identified: Parr, Hevesy, and Diffendal.

After Diffendal was identified as a suspect through the use of the DNA database, it was determined that in April 2001, Diffendal had been arrested in New York for possession of a sawed-off shotgun that had a hole in the stock. The weapon was shown to Parr, who "positively identified" the weapon "as having all of the characteristics of the weapon that was used against him that evening."

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[5] "CODIS" is the acronym for Combined DNA Index System. CODIS was developed by the FBI to "blend forensic science and computer technology into an effective tool for solving violent crimes. CODIS enables federal, state, and local crime labs to exchanged and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders." http://www.fbi.gov/hq/lab/codis/

B. Motion Suppress

Prior to trial, appellant moved to suppress evidence of his DNA profile, claiming the Act violated his rights under the Fourth Amendment. The court held a hearing on February 24, 2004. At that time, *Raines*, 383 Md. 1, had not yet been decided by the Court of Appeals.[6] At the outset of the motion hearing, appellant's counsel urged the court to suppress the evidence, arguing:

> [T]his area of law that we are dealing with is really in it's [sic] infancy. Both sides of the table are beginning to reconcile these cases with existing law and applying it under the appropriate circumstances. Here, Mr. Diffendal is involved under the CODIS hit. My understanding is that Mr. Diffendal's CODIS hit, while it is not the first case to come to occur in Baltimore County, certainly in the State of Maryland, it may have been the very first CODIS hit under this new statutory scheme, if you will.
>
> So, the point is we are dealing with the law in it's [sic] infancy. There is no binding precedence on this court in the State of Maryland in any way one way or the other.

Further, appellant's counsel argued that the warrantless seizure of appellant's DNA profile, unsupported by any showing of individualized suspicion, violated appellant's rights under the Fourth Amendment. The following exchange is pertinent:

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[6] The Court issued its opinion in *Raines* on August 26, 2004, six months after the motion hearing in this case.

[COURT]: Is it the use the statue makes of the blood sample which you contend is the Fourth Amendment violation or is it the blood itself?

[DEFENSE ATTORNEY]: It is the latter.... [H]ere, with the new statute, no individual suspicion is required on it's [sic] face pursuant to the statute. The statute when first created ten years ago was applied to a limited group of possible offenders, sexual offenders or predators, child sexual offenders, those convicted under those laws. The statute has been amended importantly twice since then. Now it includes a much broader range of individuals including anyone in the State of Maryland convicted of a felony or anyone convicted of certain misdemeanor offenses involving burglary offenses. So, for example, if you are convicted of a fraud or if you are convicted of the transportation of unstamped cigarettes in the State of Maryland, you can be subjected to the act....

* * *

They can strap you down while you're kicking and screaming to take your blood. There is no reasonable suspicion to believe that you committed a crime specifically or that when you would get out that you would reoffend. With an embarking [sic] class of citizens now subjected to this kind of Government interference in our lives, it is of great concern....

* * *

First of all, although our statute ... deal[s] with incarcerated individuals ... [o]ther DNA

statutes including the federal DNA statutes also apply to probationers.

[COURT]: Let me stop you right there. The facts in this case, as I understand it, involve Mr. Diffendal, who is in jail.

[DEFENSE ATTORNEY]: He is in jail.

[COURT]: A person … in jail has less rights than a probationer.

[DEFENSE ATTORNEY]: With that, still the problem with that position is that you have decades of Supreme Court precedence including recent case law which says any search, and it is clear here that the extraction of your blood is a search, it does implicate Fourth Amendment – we have Fourth Amendment applicability. Now, is it proper under the reasonableness clause? Here, it is not because there is no – to say that we have an otherwise properly valid idea that we can use that wonderful scientific technique of DNA to try and find more criminals or try to solve more cases, I am not going to suggest to you that concept is not a legitimate or state interest or something that should as citizen perhaps we can look at and say you know, that's not on it's [sic] face maybe a bad idea, but the way you do it here is unconstitutional .... Here, Your Honor, importantly under the Supreme Court special needs cases law enforcement as a general crime control purpose is not a special need. Special needs involve those particular cases coming out of schools where you check book bags and that sort of thing …. This is just an overly broad statute seeking to get DNA extracted from anybody they think they can. I

mean, the statute was already amended twice. We have to expect with the trend that this trend will continue to include an ever increasing class of citizens ....

* * *

[COURT]: I know obviously for a citizen who has full Fourth Amendment rights, taking our blood is a search. Taking one's blood in today's society of advanced medicine is a rather non-invasive act that people do on a regular basis for medical reasons. It's not anything that involves any, for the most part, pain or an real inconvenience or harm or anything of that nature. It is a rather simple medical procedure that's normally performed by either a nurse or a medical technician that average people go through all the time. So, this is not something of a horribly invasive nature because of what is involved with withdraw [sic] of blood from the body.

Appellant's counsel also referred to *Raines*, which arose in the Circuit Court for Montgomery County, and was then pending in this Court. The following exchange is pertinent:

[COURT]: Did that Montgomery County case ever go up any further?

[DEFENSE ATTORNEY]: Judge, it's up right now. My understanding is after the motion was granted on or about January 29, I believe the State filed an appeal .... Under that statute, that appeal is on an expedited basis.

[COURT]: Court of Special Appeals?

[DEFENSE ATTORNEY]: It is Court of Special Appeals now.

[COURT]: Right now it is a Court of Special Appeals case?

[DEFENSE ATTORNEY]: Yes.

* * *

[DEFENSE ATTORNEY]: That's why I believe the judge down in Montgomery County granted that motion to suppress because there is no law as it stands now to validly support this statute and to support the individual search without that individual suspicion.[7]

The State countered:

> If you look at this statute ... [it] is a legitimate interest of the State to create a database of individuals who are convicted of crimes that show an individual will repeat those crimes. That legitimate government interest balanced against the intrusion in this case, and it is an intrusion, it is a search, it is also a search of an inmate who has the reduced protection of the Fourth Amendment, given those circumstances and this balancing test, I would submit to you that it is a reasonable search and seizure in this case and that ... this evidence should come in.

As noted, the court denied appellant's suppression motion. In effect, the trial court determined that the Act did not

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[7] Appellant also argued that the Act violates the *Ex Post Facto* Clause. That issue has not been pursued on appeal.

violate appellant's Fourth Amendment rights. The circuit court said:

> [B]alancing the purpose of the statute against the minimal invasional nature of the withdrawn [sic] of the blood and the fact that the blood is being withdrawn from an inmate who has less rights than an average free citizen, balancing that against the legitimate governmental interest, I find ... the search in this case to be reasonable.

Thereafter, the prosecutor recited the facts to support the conviction. Appellant then renewed his motion to exclude the DNA evidence and moved for a judgment of acquittal, based on insufficient evidence. The court denied both motions and found appellant guilty.

II. DISCUSSION

The Act created a DNA collection system and repository to be used by law enforcement agencies investigating crimes, past and prospective. ACT OF 1995, Art. 88B, § 12A. *See* P.S. §§ 2-501 - 2-512. The statute requires the collection of a DNA sample[8] from every person convicted of a qualifying crime,[9]

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[8] P.S. § 2-501(g) defines a DNA sample as follows:
(g) DNA sample – "DNA sample" means a body fluid or tissue sample that is:

(1) provided by an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article; or

(2) submitted to the statewide DNA database system for analysis as part of a criminal investigation.

[9] Initially, the statute limited qualifying crimes to convictions for child sexual abuse, rape in any degree, or a sexual offense in the first, second, or third degree. ACT OF 1995, Art. 88B, § 12A(a)(8)(i)(ii)(iii). In 1999, the offenses of murder, robbery or robbery with a deadly weapon, first degree assault, and attempt to commit these offenses, were added to the category of qualifying offenses. ACT OF 1999,

without any showing of either individualized suspicion that the person has or will commit another offense, or the need for a sample to aid the investigation of a particular crime. *See* P. S. § 2-504.[10] The Court of Appeals explained the utility of DNA and

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Maryland Code, Ann., Art. 88B, § 12A(a)2(8)(iv)-(vii). The list of qualifying offenses was again expanded in 2002, to include convictions for all felonies and certain misdemeanor burglary charges. P.S. § 2-504(2).

[10] P.S. § 2-504 states:

§ 2-504. Collection of DNA samples.

(a) In general. –

(1) In accordance with regulations adopted under this subtitle, and if adequate funds for the collection of DNA samples are appropriated in the State budget, an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article shall:

(i) have a DNA sample collected on intake to a correctional facility, if the individual is sentenced to a term of imprisonment; or

(ii) provide a DNA sample as a condition of sentence or probation, if the individual is not sentenced to a term of imprisonment.

(2) If adequate funds for the collection of DNA samples are appropriated in the State budget, an individual who was convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article on or before October 1, 2003 and who remains confined in a correctional facility on or after October 1, 1999, shall submit a DNA sample to the Department.

(b) Place of collection. – In accordance with regulations adopted under this subtitle, each DNA sample required to be collected under this section shall be collected:

(1) at the correctional facility where the individual is confined, if the individual is confined in a correctional facility on or after October 1, 2003, or is sentenced to a term of imprisonment on or after October 1, 2003;

(2) at a facility specified by the Director, if the individual is on probation or is not sentenced to a term of imprisonment.

(c) Authorized collectors. -- A DNA sample shall be collected by an individual who is:

the methodology of its analysis in *Armstead v. State*, 342 Md. 38, 49, 51-53 (1996):

> DNA is the genetic material that provides the instructions for all human characteristics, from eye color to height to blood type (citing P. HARTMAN & S. SUSSKIND, GENE ACTION 2 (1965). ... A strand of DNA contains an estimated 50,000 to 100,000 genes, each of which directs the construction of a specific protein. (citing HARTMAN & SUSSKIND, supra, at 37.). ... In criminal investigations, DNA profiling is typically used to compare a suspect's DNA with a sample of DNA taken from the crime scene. DNA profiling does not compare every nucleotide of the suspect's DNA with every nucleotide of the sample DNA, but rather compares the two at selected sites that are likely to vary from person to person. It is possible, however, that sections of DNA taken from different people will match. To avoid this type of "random matching" error, comparisons are made at multiple sites or loci along the DNA chain. Typically, laboratories analyze four or five loci in conducting DNA comparisons, reducing the probability of random matches across all loci to a low level. (citing *See* L. Roberts, *Fight Erupts Over DNA*

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(1) appointed by the Director; and

(2) trained in the collection procedures that the Crime Laboratory uses.

(d) Second DNA sample. -- A second DNA sample shall be taken if needed to obtain sufficient DNA for the statewide DNA data base or if ordered by the court for good cause shown.

(e) Failure to provide DNA sample. -- Failure of an individual who is not sentenced to a term of imprisonment to provide a DNA sample within 90 days after notice by the Director is a violation of probation."

Fingerprinting, 254 SCIENCE 1721, 1721-22 (1991)).

In sum, pursuant to the Act, a DNA "profile" is developed from the sample, digitized, and placed in a database that is accessible by any agency that participates in the federal DNA database, known as "CODIS." A DNA profile developed from evidence collected at a crime scene is compared to profiles in the database, and a comparison that results in a match is statutorily deemed to constitute probable cause for the issuance of a search warrant to obtain an additional DNA sample from an identified individual. *See* P.S. § 2-510.

Diffendal maintains that the Act is unconstitutional because it permits the collection of a DNA sample from certain convicted felons, without individualized suspicion as to the person's participation in crimes other than those for which he or she was convicted. Maryland is hardly unique in this regard. DNA collection statutes have been adopted in all fifty states, the District of Columbia, and the federal government. In general, these statutes mandate the seizure of DNA, without any individualized suspicion of criminal wrongdoing. However, the qualifying offenses vary from jurisdiction to jurisdiction.

As noted, the court below denied Diffendal's motion to suppress on February 24, 2004. Six months later, on August 26, 2004, the Court of Appeals issued its opinion in *State v. Raines*, 383 Md. 1 (2004), which held that Maryland's DNA collection statute does not violate the Fourth Amendment's protection against unreasonable searches and seizures.[11] Appellant now

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[11] In its brief, the State claims that *Raines* was decided by a 5-2 vote. Appellant's brief states that *Raines* was decided by a 4-3 vote. The decision was a plurality decision that produced four opinions: the lead opinion (Judge Cathell, joined by Judge Battaglia), two concurring opinions (Judges Raker and Wilner) and a dissenting opinion (Chief Judge Bell, joined by Judges Harrell and Greene). As we said in *Cooper v. State*, 163 Md. App. 70, 91 (2005), with regard to

contends that, in light of Raines, a "remand is necessary to conduct a further hearing on defendant's motion to suppress evidence of his DNA in light of the intervening decision of the Court of Appeals in *State v. Raines*."

In urging us to remand for an evidentiary hearing,

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the Supreme Court:

> " '[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325 , 156 L. Ed. 2d 304 (2003) (quoting *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)); *accord Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (citing the concurring opinion of Justice O'Connor in *Caldwell v. Mississippi*, 472 U.S. 320, 341 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), and stating: "As Justice O'Connor supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling").
>
> *Because Justice Kennedy's opinion sets forth the narrowest grounds on which the case is decided, it represents the holding of the Court .... See United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005) (holding that Justice Kennedy's opinion in *Seibert* sets forth the applicable rule); *United States v. Stewart*, 388 F. 3d 1079, 1086 (7th Cir. 2004) (same); *but cf. United States v. Fellers*, 397 F.3d 1090, 1098 (8th Cir. 2005) (applying the plurality's multi-factored test, but finding the second, warned statement admissible under both the plurality's and Justice Kennedy's tests).[ ]

(Emphasis added).

appellant focuses on Judge Wilner's vote to uphold the constitutionality of the statute, claiming it was "dispositive." Judge Wilner's concurrence, argues appellant, turned on the premise that, "if the collection of fingerprints from an inmate is permissible, the much more instrusive collection of information-rich DNA from an inmate is also justified (and, therefore, made 'reasonable' under the Fourth Amendment) by the greater reliability of DNA as a means of identification." Appellant asserts:

> Judge Wilner reasoned that, although the seizure of DNA for placement in a database is much more intrusive than the collection and storage of fingerprints, it is nevertheless reasonable because it is a more reliable method of identification, and thus better serves the governmental interest that justifies the collection of fingerprints. *Judge Wilner's conclusion, however, was based on the factual misapprehension that a DNA "match" from a database search is more reliable than a fingerprint "match."*

(Emphasis added).

Diffendal maintains that there is "a significant factual question about the accuracy of Judge Wilner's assumption that a DNA profile is more reliable as a means of identification than a fingerprint, when it is made through a systematic search of a DNA database." As a result, appellant insists that "[a] remand is therefore necessary for a hearing to expand the factual record on this issue (one fully preserved by Diffendal and collateral to his trial) in light of the intervening appellate decision in *Raines.*"

Elucidating his request for a remand, Diffendal asserts:

> A remand for a further evidentiary hearing is necessary to determine the reliability, and,

therefore, the reasonableness of a seizure of DNA under the Maryland DNA collection statute because the central purpose of the statute is to generate cold hit cases through the seizure and permanent retention of DNA. Judge Wilner believed that, on balance, such a statutory scheme was reasonable – but *only* because he presumed that a match from a database search was *more* accurate than a match from a fingerprint database search. Without that greater accuracy, the far more intrusive seizure of a person's DNA would not be justified under Judge Wilner's Fourth Amendment balancing test. The published scientific literature plainly supports the need for a full hearing on the question of reliability.

In addition, appellant argues:

If a DNA profile match from a database search is significantly less reliable than Judge Wilner assumed, the question whether a statutory scheme whose purpose is the creation of such a database is constitutional under the Fourth Amendment remains open, notwithstanding the outcome in *Raines*. Because Judge Wilner's opinion in *Raines* had not yet issued, Diffendal's trial counsel could not possibly have known at the time of the suppression hearing that the determinative issue would turn on a comparison between the reliability of a DNA database match and a fingerprint match. A remand for further development of the factual record on this collateral point is therefore necessary, wholly appropriate, and in the interests of justice. *See* MARYLAND RULE 8-604(d).

(Emphasis added).

Further, appellant explains:

> To be clear, the question of reliability at issue when a systematic search of a DNA database produces a cold hit case is not triggered by the typical case where DNA evidence is confirming the involvement of an individual who is already deemed a suspect through other evidence. In such a confirmatory case, the statistical interpretation of the rarity of the evidence DNA profile is beyond serious dispute. That is not at issue here. Rather, the narrow question of reliability in this case arises in the context of a constitutional challenge to a statutory scheme that mandates the warrantless seizure of DNA to facilitate systematic, blind searches of a DNA database. In the context of systematic searches of DNA databases to identify suspects, there is a general consensus among experts that the danger of a coincidental match must be assessed. Notwithstanding this consensus about the problem, there is a *lack* of consensus within the relevant scientific community of statisticians about the solution for measuring the danger of a coincidental match in a cold hit case. That disagreement mandates an expansion of the record here, because *if* a DNA profile match from a search of a DNA database is less reliable than a fingerprint match, *then* the constitutionality of the Maryland DNA collection statute is directly put at issue under Judge Wilner's analysis.
>
> The unresolved dispute among statisticians demonstrates the need for a further hearing on remand to take testimony from such experts to detail the misapprehension about the greater reliability of DNA identification verses fingerprint

identification in the context of a match that results from a systematic search of a DNA database. The record must be expanded on this dispositive point because the constitutionality of the Maryland DNA collection statute hinges on the purported greater reliability of DNA verses fingerprint identification to justify the much more intrusive nature of the seizure of a person's DNA. Diffendal's trial counsel could not possibly have been alerted to this issue in advance of Judge Wilner's opinion; nevertheless, counsel below fully preserved the Fourth Amendment issue. Thus, in the interests of justice, a remand is appropriate to expand the legal record on the reliability of DNA identification resulting from a systematic search of a database.

Appellant concludes:

Judge Wilner's dispositive opinion held that, on balance, the statute was constitutional because of the *greater* reliability of a DNA profile as a means to identify an individual through a database search than a fingerprint. It is the ineluctable logic of that analysis that if a DNA database was a *less* reliable means to identify an individual than a fingerprint database, the balance would tip against the constitutionality of the statute.

It is, therefore, apparent that a remand is necessary to expand the factual record on the question of reliability of a DNA profile match from a database search. The consensus of the relevant scientific community is that a match resulting from a systematic search of a database requires special scrutiny because of the possibility of an ascertainment bias that increases the chance of a coincidental match, and the interests of

justice mandate that the Fourth Amendment significance of that consensus be fully developed for judicial review.

Alternatively, appellant argues that *Raines* was "wrongly decided," because the Act violates the Fourth Amendment. He asserts:

> Judge Cathell's lead opinion in *Raines* (joined by Judge Battaglia), fundamentally erred by applying a free-floating balancing test to determine the reasonableness of a warrantless seizure intended to advance the ordinary needs of law enforcement. *Raines*, 383 Md. 17-18. Further, in weighing the nature of the privacy interest at stake, Judge Cathell erroneously minimized the significance of the seizure of DNA by focusing on the manner of its collection instead of recognizing the highly reasonable expectation of privacy that an individual has in his information-rich DNA. *Id.* Finally, Judge Cathell overly inflated the nature of the governmental interest by mischaracterizing it as the need to identify individuals convicted of certain crimes (who the government unquestionably already knows the identity of), as opposed to the true purpose – conceded by the legislature in the express language of the statute and acknowledged by Judges Raker and Wilner, the other two judges who formed the *Raines* majority – of gathering evidence against a person for use in another criminal prosecution. *Id.* at 24-25. Thus, the error of the lead opinion in applying a free-floating balancing test was compounded by its mistakes in weighing the competing privacy and governmental interests.

The State contends that appellant is attempting to "assail or circumvent the application of Raines." In its view, appellant "misperceives the holding of Raines, and Judge Wilner's point, specifically," and his "claim is both logically and procedurally flawed."

Our analysis begins and ends-with *Raines*. There, the Court held 'that "the Maryland-DNA Collection Act is constitutional and does not violate the Fourth Amendment or the *Ex Post Facto* Clauses of the United States and Maryland Constitutions. " *Id.* at 5. In arriving at its conclusion, the Court was mindful that similar statutes exist in the federal government and in all 50 states and that no constitutional challenge to any DNA collection statute has prevailed. *Id.* at 12-14.

As noted, Judge Cathell wrote the lead opinion in Raines, joined by Judge Battaglia. To be sure, the Court characterized the collection of DNA pursuant to the Act as a search. *See*, e.g., 383 Md. at 25 ("[A] search like the one authorized by the Act ...."). According to the Court, because Raines was incarcerated at the time of the search, he had a reduced expectation of privacy. The Court then weighed the minimal intrusion that results from a cheek swab, performed upon certain convicted felons for the purpose of obtaining a DNA sample, against the "profound public interest in identifying the perpetrators of crime." *Id.* at 17-18. Recognizing the legitimate government interests in a DNA databank, the Court said, *id.* at 25:

> The DNA profile thus serves the purpose of increasing the efficiency and accuracy in identifying individuals within a certain class of convicted criminals. The purpose is akin to that of a fingerprint. As such, appellee and other incarcerated individuals have little, if any, expectation of privacy in their identity. Therefore, a search like the one authorized by the Act in this case, whose primary purpose is to identify

> individuals with lessened expectations of privacy, is totally distinguishable from search of ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals.

In her concurrence, Judge Raker stated: "I write separately because, in my view, the statute is constitutional on the narrow grounds that DNA sampling is an acceptable means of identifying prisoners, and on this basis alone, is reasonable .... I find the State's analogy to the collection of fingerprints convincing and would upheld the statute on that basis alone." *Id.* at 43-44. Judge Raker further explained: "This procedure [of swabbing the inside of the cheek] subjects a prisoner to little more inconvenience than routine fingerprinting, and it is only because the sampling occurs inside the mouth, and not on the surface of the body, that the search method itself creates a greater constitutional question than that seen in fingerprinting." *Id.* at 48.

Although Judge Wilner agreed with the majority that the Act did "not constitute or necessarily result in an unreasonable search or seizure," he believed that the issue was "a much closer one." *Id.* at 49. Judge Wilner disagreed with the majority's contention that the intrusion endured by individuals whose DNA is taken is minimal and "that its purpose is not to gather evidence but merely to establish identify." *Id.* at 50.

In his concurrence, Judge Wilner suggested that it is "misleading even to suggest much less hold, that this program is not designed for the predominant purpose of providing evidence of criminality. It clearly is." *Id.* at 51. He reasoned:

> I prefer to be more honest about the matter. All of the law enforcement and correctional statistics demonstrate that convicted criminals tend to be recidivists and that many, if

not most, people in prison are not there for their first offense - that they have committed crimes, often unsolved ones, before committing the crime for which they are incarcerated and that they are far more likely to commit future crimes than the general population or any other definable group in the general population. As a group, defined by their own judicially-determined conduct, they *do* constitute a special potential threat to public safety, even while in prison and certainly after their release. As a group, defined by their own judicially-determined conduct, they have a much reduced expectation of privacy. They are routinely fingerprinted and photographed upon arrest, and those fingerprints and photographs are stored and used for much the same purpose as the DNA samples will be used. If any interview following arrest is taped, those tapes may be preserved and used later for voice or photo identification. While in prison, they are subject to random searches, and their letters and other communications may be limited or monitored; while on probation or parole, they may be required to submit to urine testing and other intrusive monitoring. If they have committed certain kinds of sex crimes, they may be required to register with police authorities for years after being released from incarceration or probation. If they are not U.S. citizens, they may be subject to swift deportation.

As does Judge Raker in her concurring opinion, I see this really as resting on the same basis as the collection and storage of fingerprints or "mug shot" photographs. The collection of DNA is much more intrusive because of the information contained in the DNA, but DNA is also a much more reliable identifier and thus

> better serves the same governmental interest that justifies collecting fingerprints and photographs. That, to me, is where the balance is in terms of reasonableness.

Id. at 51-52.

Appellant focuses on the second to last sentence of the concurrence, arguing that Judge Wilner's view turns on whether DNA seized and placed in a database is a more reliable means of identification than a fingerprint. He contends that evidence developed from a DNA database search is not necessarily more reliable than fingerprint identification evidence. Because a DNA profile match from a database search potentially is less reliable than a fingerprint match, he maintains that he is entitled to another hearing to adduce evidence to resolve this issue. Appellant supports his argument by citing to a variety of articles that underscore the distinction between the reliability of a fingerprint match and a DNA profile match in the context of a database search. He also argue that he could not have known, six months before Raines was decided, of the need to elicit evidence on this issue.

We agree with the State that the "opinion in Raines did not turn on Judge Wilner's statement that DNA is more reliable than fingerprints or mugshots, as argued by Diffendal." Appellant would have us examine Judge Wilner's opinion in a vacuum, focusing on one sentence at the expense of the entire concurrence. He fails to consider Judge Wilner's underlying conclusion.

As we explained in Cooper, in a plurality opinion we are bound by the most narrow holding. The most narrow holding, as articulated by Judge Wilner, is that Maryland's DNA collection statute does not violate the Fourth Amendment.

In any event, appellant did not advance below the

contention he raises here. Therefore, it is not preserved. *See* Md. Rule 8-131(a).

Alternatively, appellant advances several reasons to support his claim that the *Raines* was wrongly decided. This contention shall not detain us. This Court is bound by the decision of the Court of Appeals in *Raines*. Appellant's contention to the contrary is a matter for the Court of Appeals to consider.

Finally, we note that, after oral argument, appellant submitted a "Motion to Hold Decision in Abeyance Pending Decision of United States Supreme Court in *Samson v. California*." Samson was argued in the Supreme Court on February 22, 2006. Based on our review of the briefs filed in that case, it has no bearing here; the case does not involve an issue as to the constitutionality of the Act. Therefore, we decline to delay the issuance of our opinion.

MOTION TO HOLD DECISION IN ABEYANCE DENIED. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN THE COURT OF APPEALS OF MARYLAND

Steven Diffendal v. State of Maryland,
Petition Docket No. 203
(Sept. Term, 2006)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by the certiorari is desirable and in the public interest.

/s/ Robert M. Bell

_____

Chief Judge

DATE: August 30, 2006

(SEAL)

Md. PUBLIC SAFETY Code Ann. § 2-501

PUBLIC SAFETY
TITLE 2. DEPARTMENT OF STATE POLICE
SUBTITLE 5. STATEWIDE DNA DATA BASE SYSTEM

§ 2-501. Definitions

(a) In general. -- In this subtitle the following words have the meanings indicated.
(b) CODIS.
(1) "CODIS" means the Federal Bureau of Investigation's "Combined DNA Index System" that allows the storage and exchange of DNA records submitted by federal, state, and local forensic DNA laboratories.
(2) "CODIS" includes the national DNA index administered and operated by the Federal Bureau of Investigation.

Md. PUBLIC SAFETY Code Ann. § 2-504

§ 2-504. Collection of DNA samples
(a) In general.
(1) In accordance with regulations adopted under this subtitle, an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article shall:
(i) have a DNA sample collected either at the time of sentence or on intake to a correctional facility, if the individual is sentenced to a term of imprisonment; or
(ii) provide a DNA sample as a condition of sentence or probation, if the individual is not sentenced to a term of imprisonment.
(2) An individual who was convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article on or before October 1, 2003 and who remains confined in a correctional facility on or after October 1, 1999, shall submit a DNA sample to the Department.

(b) Place of collection. -- In accordance with regulations adopted under this subtitle, each DNA sample required to be collected under this section shall be collected:

(1) at the correctional facility where the individual is confined, if the individual is confined in a correctional facility on or after October 1, 2003, or is sentenced to a term of imprisonment on or after October 1, 2003;

(2) at a facility specified by the Director, if the individual is on probation or is not sentenced to a term of imprisonment; or

(3) at a suitable location in a circuit court following the imposition of sentence.

(c) Authorized collectors. -- A DNA sample shall be collected by an individual who is:

(1) designated by the Director; and

(2) trained in the collection procedures that the Crime Laboratory uses.

(d) Second DNA sample. -- A second DNA sample shall be taken if needed to obtain sufficient DNA for the statewide DNA data base or if ordered by the court for good cause shown.

(e) Failure to provide DNA sample. -- Failure of an individual who is not sentenced to a term of imprisonment to provide a DNA sample within 90 days after notice by the Director is a violation of probation.

Md. PUBLIC SAFETY Code Ann. § 2-505

§ 2-505. Purpose of collecting and testing DNA samples

(a) In general. -- To the extent fiscal resources are available, DNA samples shall be collected and tested:

(1) to analyze and type the genetic markers contained in or derived from the DNA samples;

(2) as part of an official investigation into a crime;

(3) to help identify human remains;

(4) to help identify missing individuals; and

(5) for research and administrative purposes, including:

(i) development of a population data base after personal identifying information is removed;

(ii) support of identification research and protocol development of forensic DNA analysis methods; and

(iii) quality control.

(b) Limitations on DNA records.

(1) Only DNA records that directly relate to the identification of individuals shall be collected and stored.

(2) DNA records may not be used for any purposes other than those specified in this subtitle.

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.